



October 16, 2001

Ms. Susan K. Steeg
General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2001-4681

Dear Ms. Steeg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153406.

The Texas Department of Health (the "department") received a request for twenty-seven categories of information relating to investigative information, personnel documents, and financial information regarding several former employees of the department. You indicate that you will release or have released information responsive to categories O, O1, O2, O8, Z, and AA to the requestor. To the extent that you have not yet released that information, you must do so promptly. Gov't Code §552.221; Open Records Decision No. 664 (2000). You assert that categories O3-7, P, T, and U are questions, to which the department is not required to respond. We note that these categories do not appear to be in the form of questions, and that a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 at 8 (1990). However, we agree that the Act does not require a governmental body to prepare answers to questions or to do legal research. Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws and regulations), 555 at 1-2 (1990) (considering request for answers to fact questions). You inform us that you have asked the requestor for clarification of categories Q, R, and S.¹ You state that you do not have any documents responsive to category C of the request.²

¹A governmental body may ask a requestor to clarify a request for information if the request is unclear. Gov't Code §552.222(b); *see also* Open Records Decision Nos. 663 at 5 (1999), 304 (1982).

²The Public Information Act does not ordinarily require a governmental body to obtain information not in its possession and to which it has no right of access. Open Records Decision Nos. 663 at 7 (1999), 558 (1990), 499 (1988).

You have not submitted any information marked as responsive to categories D, E, F, W, or X of the request, nor do you inform us whether the department holds information responsive to those categories other than that submitted to this office. Section 552.301(e) of the Government Code requires a governmental body to submit to this office within fifteen business days of receiving an open records request, among other information, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code §552.301(e)(1)(D).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. Gov't Code §552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted any information that you indicate to be responsive to categories D, E, F, W, and X of the request³, we have no basis for determining whether a compelling reason exists for withholding any such information. Thus, we have no choice but to order that, to the extent that the department possesses any information responsive to categories D, E, F, W, or X, that is not contained in or truly represented by the submitted information, it must promptly release that information to the requestor pursuant to section 552.302. If you believe any such information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.⁴

Initially, we note that the submitted documents contain information that falls within the purview of section 552.022. Section 552.022 provides, in pertinent part, as follows:

³Although you have not marked specific information as responsive to D, it is our opinion that some or all of the information labeled as "Documents regarding Jack Baum, other than those requested in A" may be responsive to that portion of the request.

⁴We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(4) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

...

(7) a description of an agency's central and field organizations . . . ;

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

...

(10) . . . a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

...

(13) a policy statement or interpretation that has been adopted or issued by an agency;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code §552.022(a). The submitted documents also appear to include copies of statutes, which are inherently public and may not be withheld. *See* Open Records Decision No. 551 (1990) (difficult to image a circumstance that would bring a law or ordinance within an exception to public disclosure).

Although you argue that section 552.103 of the Government Code will except the information at issue from public disclosure, section 552.103 is a discretionary exception under the Act and does not constitute "other law" for the purposes of section 552.022.⁵

However, we note that some of the submitted information is confidential by law under sections 552.101, 552.117, 552.130, 552.136 and 552.137 of the Government Code. We will therefore address those exceptions for the information subject to release under section 552.022.

A portion of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. A portion of the information at issue is confidential pursuant to sections 12.003 and 21.012 of the Human Resources Code. Sections 12.003 and 21.012 prohibit the disclosure of information concerning clients of a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.301; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 of the Human Resources Code provides:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

⁵Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107); Open Records Decision No. 473 (1987) (governmental body may waive section 552.111); *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977). It appears that release of the information that is confidential under sections 12.003 and 21.012 of the Human Resources Code would not be for purposes directly connected with the administration of the department. It also appears that the document containing this information constitutes "any information concerning" persons applying for or receiving assistance. Therefore, this information is confidential under sections 12.003 and 21.012 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code. We have marked it accordingly.

Section 552.117 may also be applicable to some of the submitted information. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the department must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The department may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

We next note that the information at issue contains motor vehicle information which is private under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

- (2) a motor vehicle title or registration issued by an agency of this state[.]

The department must withhold Texas driver's license numbers, vehicle identification numbers, and license plate numbers under section 552.130.

The 77th Texas legislature recently added section 552.136(b) to the Government Code which provides in pertinent part that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *See* Act of May 14, 2001, 77th Leg., R.S., S.B. 694 (to be codified at Tex. Gov't Code, §552.136) (effective May 26, 2001). Account numbers within the information at issue must be withheld under section 552.136(b).

Finally, we note that the information at issue also contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.⁶ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The department must, therefore, withhold e-mail addresses of members of the public under section 552.137.

Therefore, we find that, except for the information confidential by law as discussed above, the information which we have marked is public information not excepted from public disclosure under section 552.022, and must be released.

⁶House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

We will now consider your section 552.103 claim for the remainder of the submitted information. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the requestor's client filed a lawsuit on July 19, 2001, prior to the department's receipt of the request for information on July 30, 2001, and that the department is a party to that suit. Based upon your representation, we find that litigation was pending on the date the request for information was received by the department. Having reviewed the remaining submitted information, we find that it is related to the pending litigation. Therefore, the department may withhold the information which we have marked under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

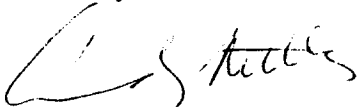
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 153406

Enc. Submitted documents

c: Ms. Alicia A. Wilde
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(w/o enclosures)